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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

Estate of FRED NAVA, Deceased.	H026622 (Santa Clara County Super. Ct. No. PR056950)
MARGIE LYNN MORGAN, as Administrator, etc., Petitioner and Respondent, v. MARY WELLS, Objector and Appellant.	

Margie Lynn Morgan filed a petition to (1) set aside an order for probate, (2) set aside the issuance of letters of administration to Mary Wells, (3) set aside the judgment for distribution, and (4) reopen probate proceedings and appoint herself as the new administrator. She argued two related, entwined concepts: one, that the court had lacked jurisdiction to make the previous orders because she received no notice of the proceedings though she was a known heir and therefore entitled to notice under Probate Code section 1206, subdivision (a)(1); and two, that the orders were void due to extrinsic fraud, being Wells's intentional failure to give notice and misrepresentations to the court that no heirs other than Wells existed. Wells countered that the published notice conferred jurisdiction and Morgan was required to file an equitable action to attack the

probate orders. She alternatively argued that Morgan's petition was barred by laches and the three-year statute of limitations for relief based on fraud or mistake (Code Civ. Proc., § 338). The probate court granted Morgan's petition.[1] On appeal, Wells reiterates her arguments. We affirm the order granting the petition.

BACKGROUND

Mary Espinosa gave birth to the following: Frank Espinosa (born 1921--father John Vilche); Ann Stoker (born 1924--father Melchor Rondon); Wells (born 1931--father John Nava); and Fred Nava (born 1937--father John Nava).

Mary died in 1964, leaving her spouse, John, and the four children.

Ann died in 1973, leaving two children: Morgan and Robert Stoker. Morgan and her husband then moved to Grants Pass, Oregon where Wells resided. Morgan and Wells had a close familial relationship and spoke to one another frequently.

John died in 1979. His will devised his estate to Fred.

Fred died in 1992 without a will. By statute, his heirs were brother Frank (1/3), sister Wells (1/3), and sister Ann's children, Morgan and Robert (1/3). Wells filed a petition for letters of administration that listed only herself and her two daughters as Fred's next of kin. The court appointed Wells as administratrix. And it ultimately entered a judgment that distributed Fred's estate to Wells.[2] Wells did not serve Frank, Morgan, or Robert with notice of any of the probate proceedings. She told Morgan that

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[1] The probate court did not explicitly reject Wells's defenses, but the rejection is implicit. Laches is an equitable defense and one who advances the defense must come into court with clean hands. (11 Witkin, Summary of Cal. Law (9th ed. 1990) Equity, § 8, p. 684.) By deciding against Wells, the probate court necessarily found that Wells failed to give notice to a known heir--an omission that could be defined as one of unclean hands. And there is no statute of limitation for a collateral attack on a void judgment or order. (*Texas Co. v. Bank of America etc. Assn.* (1935) 5 Cal.2d 35, 41.)

[2] The estate consisted of approximately $63,000 and real estate appraised at $279,000.

Fred had left everything to her (Wells) and gave Frank $5,000 out of regret that Fred did not leave anything to him.

In 2003, Wells petitioned to become Frank's conservator. At some point, she asked Morgan whether, at Frank's death, Morgan would like her to forget that Morgan had a brother so that Morgan would receive a larger share of Frank's estate. This prompted Morgan to investigate Fred's probate and resulted in the petition at issue.

APPEALABILITY

Morgan concedes that the aspect of the order that appoints her as administrator is appealable. (Prob. Code, § 1303, subd. (a).) She contends that the other aspects of the order are not appealable because the Probate Code does not make them appealable. She then concludes that, because Wells makes no argument against the appointment-aspect of the order, the appeal should be dismissed. We disagree.

Code of Civil Procedure section 904.1, subdivision (a)(10), provides general statutory authority to appeal from orders rendered in probate proceedings ("An appeal . . . may be taken . . . [f]rom an order made appealable by the provisions of the Probate Code"). The statute therefore makes the Probate Code provisions on appealability exclusive, and, with rare exceptions, no appeal lies other than from the orders specified in the Probate Code. (*Gertner v. Superior Court* (1993) 20 Cal.App.4th 927, 930.)

But the label given the order does not necessarily determine appealability. The right to appeal is determined by the effect of the order. A probate order that has the same effect to an order expressly made appealable by the Probate Code is itself appealable. (*Estate of Martin* (1999) 72 Cal.App.4th 1438, 1442.)

Here, the orders "set aside" an order for letters, an order for probate, and a judgment distributing the estate. Probate Code section 1303, subdivision (a), authorizes an appeal from an order "revoking letters to a personal representative," and subdivision (b) authorizes an appeal from an order "revoking the probate of a will." Setting aside has the same effect as revoking. The aspect of the order setting aside the orders for letters

and probate are therefore appealable. Though there is no provision in the Probate Code authorizing an appeal from an order revoking a judgment directing distribution of property, the judgment in this case is dependent upon the existence of the orders for letters and probate. Because the orders for letters and probate were set-aside, setting aside the judgment followed as a matter of course. If the set aside orders are reversed, reinstating the judgment follows as a matter of course. Thus, no purpose would be served by treating the judgment-aspect of the order independently from the remaining aspects.

DISCUSSION

"The probate of an estate consists of a series of procedures, from the initial appointment of an executor or administrator to the final distribution of the estate. At each stage, the Probate Code specifies what notice must be given to interested parties. [Citation.] The notice requirements are jurisdictional, so failure to comply with the statutory requirements may render the resulting proceedings void. [Citations.] Thus, a claim of lack of jurisdiction is a corollary to a claim of insufficient notice. The trial court is without jurisdiction to make an order which has not been properly noticed, unless the right to notice has been waived." (*Estate of Jenanyan* (1982) 31 Cal.3d 703, 708.)

Wells disagrees that this concept allowed the probate court to set aside its orders. She argues that a probate proceeding is one that is in rem rather than in personam. From this, she reasons that the failure to obtain personal jurisdiction over all possible heirs in a probate proceeding does not divest the court of jurisdiction over the rem. She relies on *Estate of Buckley* (1982) 132 Cal.App.3d 434, 445-446, which makes the point that the term "jurisdiction" has several meanings with regard to the validity of judgments and recognizes that failure to comply with a statutory requirement renders a judgment "void" only when the statute "relates to jurisdiction in the 'fundamental' sense, that is to authority over the subject matter or the parties." (*Id.* at p. 446.) The case goes on to state: " 'Fundamental jurisdiction refers to the authority of the court *to hear a case and bind the parties* by any lawful judgment or order. Nonfundamental jurisdiction refers to

the authority of the court to make a particular judgment or order.' [Citation.]" (*Id.* at p. 448.)

We need not examine whether the statutory provisions that require notice to all possible heirs relate to the court's fundamental or nonfundamental jurisdiction. (But see *Texas Co. v. Bank of America etc. Assn.*, *supra*, 5 Cal.2d at p. 41 [where notice is required to be given and is not given, the resultant order is void and may be collaterally attacked by anyone at any time].) This is because Wells concedes that the orders can be collaterally attacked. Reduced to its essence, Wells's point is that Morgan's collateral attack on the orders was procedurally improper because her remedy was an independent action in equity rather than a motion in the original action. Wells, however, cites no authority for her proposition.

In any event, the current trend is to allow a collateral attack to be made by either a motion in the original action or an independent action. "Some early cases doubted the propriety of the summary remedy of *motion in the original action*. But this is now recognized as an alternative method of raising the grounds for equitable relief against a judgment, provided that the motion is made within a reasonable time." (8 Witkin, Cal. Procedure (4th ed. 1997) Attack on Judgment in Trial Court, § 219, p. 722; see, e.g., *Estate of Beard* (1999) 71 Cal.App.4th 753, 774 [probate court has power to set aside its own final orders on ground of extrinsic fraud or mistake].) It is true that the motion procedure is limited and lacks the advantages of an actual trial on the merits. But if one believes that a party is using the motion procedure as a means of obtaining relief on a showing weaker than would be required in an independent action, he or she is free to advance the point to the trial court as a reason for denial of the motion.

DISPOSITION

The order granting Morgan's petition is affirmed.

Premo, J.

WE CONCUR:

Rushing, P.J.

Elia, J.